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No. 07-1434

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In The Supreme Court of the United States

DIXIE NATIONAL LIFE INSURANCE COMPANY AND NATIONAL FOUNDATION LIFE INSURANCE COMPANY,

Petitioners,

v.

MARTHA WARD, Individually and on behalf of all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE BRIEF* AND BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The National Association of Insurance Commissioners ("NAIC") respectfully moves this Court, pursuant to Rule 37.2(b), for leave to file a brief as *amicus curiae* in this case in support of the Petition for a Writ of Certiorari, and in support of its motion states:

1. Counsel of record for the NAIC attempted to obtain the consent of all parties to the filing of an *amicus curiae* brief by the NAIC by contacting the parties' counsel of record.

2. The Petitioners, Dixie National Life Insurance Company and National Foundation Life Insurance Company, have consented to the filing of an *amicus curiae* brief by the NAIC through its counsel of record, Kenneth W. Starr, of Kirkland & Ellis, L.L.P.

3. The Respondent, Martha Ward, through counsel of record, Richard A. Harpootlian, of Richard A. Harpootlian, P.A., did not consent to the filing of an *amicus curiae* brief by the NAIC.

4. The NAIC has a strong interest in this case as set out fully in the brief submitted with this motion because the Fourth Circuit decision being appealed departs from the accepted and usual course of judicial proceedings, which unquestionably call for meaningful deference on matters within a regulatory agency's area of expertise.

5. The proper interpretation of the term "actual charges" stated in an insurance policy is within

the area of expertise of the South Carolina Department of Insurance, which is Congressionally delegated broad authority to regulate the business of insurance and statutorily mandated to review and approve insurance policies, identify and resolve any ambiguity, respond to consumer inquiries and investigate disputes between insurers and insureds.

6. The Fourth Circuit's decision should be taken up by this Court to rectify the explicit lack of deference given to the judgment of the South Carolina Department of Insurance.

7. As the representative of the coordinated and considered views of the state government officials that regulate and enforce the insurance laws of the country, the NAIC is uniquely qualified and situated to apprise this Court of the potential national impact of the Fourth Circuit's decision, which can be avoided if certiorari is granted.

WHEREFORE, the National Association of Insurance Commissioners respectfully moves this Court for leave to file the following brief as *amicus curiae* in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

1. IDENTITY OF *AMICUS CURIAE*

The National Association of Insurance Commissioners ("NAIC") is a not-for-profit Delaware corporation whose membership consists of the chief insurance regulatory officials of each state, the territories and insular possessions of the United States and the District of Columbia. Created in 1871, the NAIC is the nation's oldest association of state government officials. The mission of the NAIC is:

> [T]o assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost effective manner, consistent with the wishes of its members: promote the public interest; promote competitive markets; facilitate the fair and equitable treatment of insurance consumers; promote the reliability, solvency and financial solidity of insurance institutions; and

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[1] No counsel for a party authorized this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae's* intention to file this brief.

support and improve state regulation of insurance.[2]

The NAIC's purpose is to provide its members with a national forum enabling them to work cooperatively on regulatory matters that transcend the boundaries of state jurisdictions. Collectively, the state insurance commissioners work to develop model legislation, rules, regulations, white papers and actuarial guidelines that promote and establish uniform regulation. Their overriding objectives are to protect consumers as well as assist in maintaining the financial stability of the insurance industry.

Any member of the NAIC may request the filing of an *amicus curiae* brief. All such requests require approval by the NAIC's Executive Committee. The Executive Committee has approved the filing of this *amicus* brief in support of the Petition for Writ of Certiorari.

2. INTEREST OF *AMICUS CURIAE*

The NAIC submits this brief to apprise the Court of the regulatory framework supporting the states' authority to regulate the business of insurance as directed by the McCarran-Ferguson Act.[3] The Supreme Court has previously considered the input of

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[2] NAIC, NAIC Mission Statement, http://www.naic.org/index_about.htm (last visited June 16, 2008).

[3] 15 U.S.C. §§ 1011-1015 (2000).

the NAIC with regard to the McCarran-Ferguson Act and stated "[t]he views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill."[4] The McCarran-Ferguson Act expressly directs the states to regulate the business of insurance.[5] State insurance regulators carried out the mandate of McCarran-Ferguson by developing a complex and interdependent system of regulation that applies to insurance companies, producers and service providers. Each state relies on its federal and state statutory authority to regulate insurers domiciled or selling insurance within its state to ensure protection of the consumer.

The issues before this Court affect the NAIC because the Fourth Circuit substituted its own judgment for the deliberate and reasoned decision of the South Carolina Department of Insurance. As is the case with insurance regulators across the country, as assisted by the NAIC, the Department's statutorily mandated purpose is to promote the reliability and stability of insurance institutions and ensure the fair, just and equitable treatment of policyholders and claimants. The Fourth Circuit's opinion frustrates that purpose by disregarding the judgment and questioning the statutory authority of an administrative agency. Because the Fourth Circuit failed to give appropriate deference to the Department's reasoned

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[4] Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 221 (1979).

[5] 15 U.S.C. § 1012(a) (2000).

interpretation of the term "actual charges," consumer protection is threatened. The outcome of this decision may effectively remove the interpretation of insurance policies from the Department's jurisdiction, as well as cast doubt on the ability of states to respond to consumer inquiries about policies whose content is subject to regulatory approval. The ability of the states to provide a stable and authoritative framework for approving insurance company products, forms and financial statements is necessary for the $1.4 trillion domestic insurance market[6] to function successfully. If the Court of Appeals' opinion is allowed to stand, this framework will be jeopardized.

For these reasons, the NAIC requests this Court accept the Petition for Writ of Certiorari in this case. This is consistent with statutory and common law principles and is in the best interest of insurance consumers, who commissioners protect under both federal and state law.

SUMMARY OF ARGUMENT

The Fourth Circuit Court of Appeals erred by refusing to give any deference to the South Carolina Department of Insurance's interpretation of the term "actual charges" in Respondent's supplemental cancer insurance policy, and this Court should grant the

[6] NAIC, 2006 INSURANCE DEPARTMENT RESOURCES REPORT 40 (2007).

Petition for Writ of Certiorari and reverse the decision below to correct the error below. The Fourth Circuit's decision substitutes its own judgment for that of South Carolina's Department of Insurance. This precedent violates the clear Congressional delegation of authority that underlies the broad regulatory regime enforced by South Carolina's state insurance supervisors. The Fourth Circuit misapplied well-established law that calls for deference to administrative agency judgment, and this error will have a profound national impact on the ability of state insurance departments to regulate the business of insurance. The Court of Appeals' finding that the South Carolina Department of Insurance lacked a statutory mandate to interpret Respondent's insurance policy discredits and could effectively weaken the primary function of state insurance regulation – consumer protection.

ARGUMENT

1. THE FOURTH CIRCUIT'S REFUSAL TO GRANT APPROPRIATE DEFERENCE TO THE STATE REGULATOR'S REASONED INTERPRETATION OF RESPONDENT'S SUPPLEMENTAL CANCER INSURANCE POLICY DIRECTLY UNDERMINES CONGRESS' EXPRESS DELEGATION OF AUTHORITY OVER THE BUSINESS OF INSURANCE TO THE STATES.

The McCarran-Ferguson Act was enacted in 1945 to subject the business of insurance to the laws of the several states.[7] The authority of the states to regulate the business of insurance was reaffirmed in 1999 by the passage of the Gramm-Leach-Bliley Act.[8] States regulate the business of insurance pursuant to this federal delegation and their statutory police powers. As to what constitutes the business of insurance, statutory definitions of insurance identify the underlying elements of insurance rather than provide a specific listing of insurance products.[9] For example, South Carolina defines insurance as "[a] contract

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[7] 15 U.S.C. § 1012(a) (2000).

[8] 15 U.S.C. § 6701 ("The Act entitled 'An act to express the intent of Congress with reference to the regulation of the business of insurance' and approved on March 9, 1945 ... remains the law of the United States."). 15 U.S.C. § 6711 (2000) ("[T]he insurance activities of any person ... shall be functionally regulated by the states.").

[9] NAIC, DEFINITION OF INSURANCE WORKING GROUP WHITE PAPER 2 (2000).

whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies."[10] This approach gives state insurance regulators the flexibility to tailor their regulatory practices to an industry that continuously offers new and dynamic products to consumers.

Under McCarran-Ferguson, if a practice constitutes the "business of insurance," then the state must establish laws to ensure effective regulation of that practice. Petitioners' reimbursement of expenses incurred by Respondent for cancer treatment qualifies as the business of insurance.[11] Therefore, it is appropriate for the state to regulate that activity.

A state's department of insurance is charged with enforcing and implementing state insurance laws, reviewing and approving insurance policies, resolving disputes between insureds and insurers, along with many other functions aimed at protecting consumers. For instance, the mission of the South Carolina Department of Insurance is "to protect the insurance consumers, the public interest and the insurance

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[10] S.C. CODE ANN. § 38-1-20 (2002).

[11] *See* Blackfeet v. Nelson, 171 F.3d 1237, 1246-1247 (11th Cir. 1999) ("For McCarran-Ferguson Act purposes, three-part test used for determining whether an activity constitutes part of the 'business of insurance' asks first, whether the practice has the effect of transferring or spreading a policyholder's risk, second, whether the practice is an integral part of the policy relationship between the insurer and the insured, and third, whether the practice is limited to entities within the insurance industry.").

marketplace by ensuring the solvency of insurers . . . ."[12] The Department of Insurance reviewed and approved the supplemental cancer policy at issue and, upon Respondent's inquiry, opened an investigation into her dispute with Petitioners. The investigation was concluded with two written findings, now supplemented by four briefs as *amicus curiae* in the lower courts, that Respondent's definition of "actual charges" as applied to Respondent's policy is consistent with applicable law. The Fourth Circuit's failure to give deference to South Carolina's deliberate and reasoned interpretation violates Congress's explicit delegation of authority under the McCarran-Ferguson Act to regulate the business of insurance.

To reach its conclusion, the Fourth Circuit reasoned that South Carolina did not have authority to determine the meaning of a term contained in an insurance policy. This reasoning runs contrary to Congressional intent that the states regulate the business of insurance. The Department was statutorily mandated to regulate the policy at issue. The determination that "actual charges" were discounted charges was a reasonable reading of the policy not contrary to its plain meaning. Under settled precedent, a state agency's interpretation of a statute it is charged with administering merits "the most respectful consideration and should not be overruled absent

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[12] South Carolina Department of Insurance, About the South Carolina Department of Insurance, http://www.doi.sc.gov/about/ (last visited June 16, 2008).

compelling reasons."[13] Therefore, the Fourth Circuit should have granted appropriate deference to the Department's interpretation of the policy.[14]

If the Court of Appeals' opinion is allowed to stand, it will have the effect of undermining Congress' intent that the insurance industry be regulated by state governments. The NAIC requests that the Supreme Court grant certiorari and reverse the Fourth Circuit's decision.

2. THE FOURTH CIRCUIT'S REFUSAL TO GRANT APPROPRIATE DEFERENCE TO THE STATE REGULATOR'S REASONED INTERPRETATION OF RESPONDENT'S SUPPLEMENTAL CANCER INSURANCE POLICY CHALLENGES THE MOST FUNDAMENTAL FUNCTION OF STATE INSURANCE REGULATION.

Insurance regulators are statutorily charged with protecting consumers in a number of ways: overseeing the solvency of insurance companies,[15] licensing insurance companies[16] and producers who solicit the purchase of insurance,[17] reviewing and approving

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[13] Sloan v. South Carolina Board of Physical Therapists, 636 S.E.2d 598, 607 (2006).

[14] NationsBank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995).

[15] *See* S.C. CODE ANN. § 38-9-10 (2002).

[16] *See, e.g.*, S.C. CODE ANN. §§ 38-5-10 to 38-5-220 (2002).

[17] *See* S.C. CODE ANN. §§ 38-43-20 to 38-43-30 (2002).

insurance products sold to consumers,[18] and investigating and examining the market practices of insurance companies.[19] These examples are merely a sample from the comprehensive statutory framework in place nationwide to carry out the twin purposes of consumer protection and marketplace solvency.

A key aspect of the regulatory responsibility delegated to the South Carolina Director of Insurance is to review and approve insurance products sold to consumers.[20] The law affords the Director full discretion to reject product filings containing "provisions which are unfair, deceptive, ambiguous, misleading, or unfairly discriminatory."[21] This type of authority, along with many more specific product requirements,[22] is in place in every state, the District of Columbia and Puerto Rico because the simple promise to pay offered by most insurance products takes the form of increasingly complex insurance policies, riders and applications, known collectively as "forms."

The regulatory review and approval of insurance forms is within the province of dedicated professional personnel in each insurance department, who are

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[18] *See* S.C. CODE ANN. § 38-61-20 (2002).

[19] *See* S.C. CODE ANN. § 38-13-10 (2002).

[20] S.C. CODE ANN. § 38-61-20 (2002).

[21] *Id.*

[22] *See, e.g.*, S.C. CODE ANN. §§ 38-63-210 to 38-63-280 (2002) (providing detailed requirements for individual life insurance policy forms).

trained to apply the specific product requirements set forth in statute and administrative regulation. These professionals also have the expertise to identify and evaluate potential areas of ambiguity in a filed form. This ability is developed through experience in reviewing and comparing countless insurance policies and understanding market trends.

Illustrative of the workload and complexity inherent in the form review and approval function is the fact that insurance departments across the country employed almost 1,200 individuals to support the actuarial and analytical aspects of form review and approval in 2006.[23] In 2007 the South Carolina Department of Insurance issued a disposition for 14,290 product filings across all types of insurance.[24]

As *amicus curiae,* the NAIC believes that the form review and approval expertise present in the South Carolina Department of Insurance lends further weight to Petitioners' argument that the Fourth Circuit erred by not deferring to the Department's interpretation of the term "actual charges." It is well established that courts must defer to regulatory agencies regarding the construction of laws those

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[23] NAIC, 2006 INSURANCE DEPARTMENT RESOURCES REPORT 7 (2007).

[24] South Carolina, South Carolina Department of Insurance Database, https://online.doi.sc.gov/Eng/Public/Queries/FlngSrch.aspx (searching for date approved/closed range of Jan. 1, 2007 to Dec. 31, 2007) (last visited June 16, 2008).

agencies enforce.[25] Likewise, federal courts sitting in diversity must defer to states regarding the construction of state laws.[26] The dismissive approach of the Fourth Circuit toward the Department's reasoned interpretation of the policy term and its ambiguity, which the Department is statutorily authorized to determine,[27] violates these axiomatic principles.

The Fourth Circuit's finding that it need not defer to the Department hinges on the perceived lack of a "statutory mandate to pronounce the meaning of a term in an individual insurance policy."[28] The Petitioners address the deficiencies in this conclusion by arguing that the Department's written interpretations and previous briefs constitute a definitive administrative finding,[29] and by pointing to the Department's broad statutory authority to investigate disputes and oversee the content and servicing of insurance in the state.[30] The NAIC as *amicus curiae* fully supports these points, and is prepared to elaborate on the statutory foundation for the activity undertaken by the Department in this case.

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[25] Dunton v. S.C. Bd. of Exam'rs in Optometry, 353 S.E.2d 132, 133 (S.C. 1987).

[26] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[27] S.C. CODE ANN. § 38-61-20 (2002).

[28] Ward v. Dixie Nat'l Life Ins. Co., 257 F. App'x 620, 626 (4th Cir. 2007).

[29] Pet'rs Br. 18.

[30] *Id.* at 17 (referring to S.C. CODE ANN. §§ 38-3-110 and 38-3-150).

The activity undertaken by the Department reflects the hallmark of state insurance regulation – responding to consumers. The broad delegation of regulatory authority embodied by the McCarran-Ferguson Act, as discussed above, necessarily includes the authority for state insurance officials to provide information to consumers about the benefits available to them through insurance products they shop for and purchase. Departments of insurance, and the NAIC on their behalf, establish and maintain many sources of information for consumers, ranging from searchable electronic databases of consumer complaints and insurer financial statements to issue-based consumer alerts and educational campaigns.

In addition to conducting form review and approval and serving as information clearinghouses, every insurance department has a statutory duty to determine and prohibit unfair and deceptive acts.[31] This function and the Department's investigatory authority rely largely on the Department's ability to receive and handle consumer inquiries and complaints. A logical outgrowth of these responsibilities is the authority to close a complaint, i.e., issue an interpretation informing a consumer that the issue or question the consumer raised does not rise to the level of an unfair trade or claims handling practice. In this case, the Department's interpretation informed the

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[31] *See, e.g.*, S.C. CODE ANN. § 38-57-10 (2002) (generally prohibiting unfair trade practices).

consumer that the definition of "actual charges" applied by the insurance company is consistent with the approved policy terms and applicable law. The Fourth Circuit's conclusion that this determination does not carry the weight of a statutorily-authorized finding calls into question this basic regulatory authority exercised daily by the Department and other insurance regulators across the country.

The fundamental nature of the Department's actions in this case is demonstrated by the depth and breadth of regulatory efforts devoted to handling consumer complaints nationwide. More than 1,700 individuals were employed by state insurance departments in the area of consumer affairs in 2006.[32] This includes 542 complaint investigators apart from the complement of investigators and other professionals in the areas of market conduct, antifraud and licensing enforcement.[33] South Carolina alone reported a staff of ten dedicated to consumer affairs.[34] Even given this level of staffing, the volume of consumer inquiries and complaints handled by state insurance departments is staggering. In 2006, insurance regulators reported receiving 393,654 consumer complaints and 2,562,064 consumer inquiries such as Respondent's.[35] It is startling to consider the resources devoted to

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[32] NAIC, 2006 INSURANCE DEPARTMENT RESOURCES REPORT 11 (2007).

[33] *Id.*

[34] *Id.*

[35] *Id.* at 66.

consumer protection given that, according to the Fourth Circuit,[36] the Department lacks statutory authority to respond to crucial policyholder questions about insurance coverage. If the Fourth Circuit's conclusion that the Department lacks statutory authority to interpret the meaning of policy terms is allowed to stand, it has the potential to destabilize a key aspect of insurance regulation and will have far reaching effects impacting all states.

CONCLUSION

The Fourth Circuit's refusal to grant appropriate deference to the Department's interpretation of the policy term at issue in this case establishes a federal precedent which undermines the vast regulatory nationwide framework of state based insurance replacing a court's judgment for the expertise of a network of insurance experts to review and approve or reject insurance products, receive complaints and resolve claims from consumers. This network is supported by a broad, Congressionally delegated statutory framework mandating oversight of insurance policies and market practices before and after insurance is purchased. Inherent in this framework is the authority to issue interpretations of policy terms, including interpretations finding that a definition

[36] Ward v. Dixie, 257 F. App'x 620, 626 at n.3 (4th Cir. 2007).

applied by the insurance company is consistent with applicable law and regulation. Absent a "compelling reason" deference should be given to the Department's interpretation of the term actual charges. To do otherwise would have an acute financial impact on the health insurance industry subjecting insurers to payment of claims for uninsured interests. This case should be accepted for certiorari to reinforce the general regulatory framework delegated to the states by the McCarran-Ferguson Act and the supporting body of law.

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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